the plaintiffs shall be deemed to have withdrawn the appeal and the decision of the Rent Tribunal shall be deemed to be final.

With that one would expect the whole matter to rest.

The only recourse now open to the plaintiffs is by way of certiorari to quash the order on what the plaintiffs think is an error on the record.

The learned legal adviser, representing the third defendant, raised a preliminary point of law. He contended that the plaintiffs should have proceeded by way of an appeal. The law here is very clear. (See *Government of Malaysia & Anor* v *Jagdis Singh*[1] and *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd.*[2]) Of course, the plaintiffs need not wait to exhaust their right of appeal to come to the court for certiorari (see *Lai Cheng Cheong* v *Sowaratnam*[3].) But then, in our case, the plaintiffs did exercise their rights to appeal, but when found to be out of time to file the memorandum of appeal, scrutinized the record of proceedings before the Rent Tribunal and filed this notice of motion for certiorari.

It cannot be said here that there was a glaring error on the record to seek immediate intervention of the court and order for certiorari to prevent irreparable damage or harm if the proceedings were to continue, as envisaged by *Lai Cheng Cheong's* case.[3] That is not the situation here. The plaintiffs found they had failed to file the memorandum of appeal within the prescribed time limit and out of time. There was no other way out. One would have thought, after being out of time, the plaintiffs would have applied to the court for extension of time to file the memorandum of appeal. Probably there were no grounds to support such an application.

The authorities cited earlier are quite clear and this court upheld the objection raised by the learned state legal adviser and hence the application of the plaintiffs was therefore dismissed with costs.

Application dismissed.

Solicitors: *Arifin & Partners* ; *Gill & Tang* .

Reported by *Ng Sheau Jiuan*

United Asian Bank Bhd v The Negeri Sembilan Development Corporation

HIGH COURT (SEREMBAN) – CIVIL SUIT NOS 23-255 OF 1986 AND 23-256 OF 1986
MUSTAPHA HUSSAIN J
19 NOVEMBER 1988

Banking – Guarantee – Amendment Act introduced provision prohibiting defendant from entering into any guarantee – Provision to have retrospective effect – Guarantee given prior to amendment Act but affected by its retrospective operation – Whether defendant still liable on guarantees – Incorporation (State Legislatures Competency) Act 1962, ss 2, 4(a), (b), Second Schedule para 14(1)(d)

Statutory Interpretation – Amendment Act introduced provision prohibiting defendant from entering into any guarantee – Provision to have retrospective effect – Guarantee given prior to amendment Act but affected by its retrospective operation – Whether retrospective operation to be given to statute so as to impair existing right or obligation – Language to be very clear

The defendant gave a number of letters of guarantee to the plaintiff bank in consideration of the plaintiff opening and continuing to maintain an account for two companies in which the defendant was the major shareholder. The period covered by the guarantees was from 1974-76. The companies went into liquidation and the plaintiff bank claimed against the defendant as guarantor. The senior assistant registrar dismissed the plaintiff bank's application for summary judgment and leave was given for the defendant to defend. The plaintiffs appealed against this decision.

In the appeal, the defendant argued that the Incorporation (State Legislatures Competency) Act 1962 was amended in 1981 whereby certain provisions of the Act were given retrospective effect, which covered the period of the guarantees. The amendment laid down that no corporation shall, without the prior consent in writing of the Minister of Finance, enter into any guarantee involving financial liability, and as such, the defendant, argued, there was no liability on the guarantees issued by them.

Held, allowing the appeal:

(1) During the period 1974-76, the law in force vis-à-vis the defendant was s 17B of the Negri Sembilan Development Corporation Enactment 1969 (Negri Sembilan Government Enactment No 4 of 1969) which stated that 'the Corporation shall not stand as guarantor to any loan ... made by any person to any organization except to an organization in which the Corporation has a commercial interest ...'. Clearly, the defendant has no defence at all on the guarantees given. The defendant has the commercial interest in the two companies, in whose favour the guarantees were issued.

(2) A retrospective operation is not to be given to a statute so as to impair an existing right or obligation or otherwise than as regards matters of procedure, unless the language is very clear and capable of only one meaning in that it is retrospective. It is most unfair to resort to retrospective Enactments just to avoid a party's legal obligations.

(3) In the present case, nowhere is there a clear provision in the amendment Act making it retrospective the taking away of an existing right or abolishing an existing obligation.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 406 of 1988.]

Cases referred to
1 *Re Athlumney* (1898) 2 QB 547 (folld)
2 *Re Chapman* [1896] 1 Ch 323 (folld)
3 *Pardo* v *Bingham* (1868-69) 4 LR Ch App 735 (folld)

Legislation referred to
Incorporation (State Legislatures Competency) Act 1962 (Act of Parliament No 15 of 1962) ss 2, 4(a), (b), Second Schedule para 14(1)(d)
Negeri Sembilan Development Enactment 1969 (Negri Sembilan Government Enactment No 4 of 1969) s 17B

Chin Yew Meng for the plaintiff.
Too Kok Leng for the defendant.

Cur Adv Vult

Mustapha Hussain J: The two applications made by the plaintiff bank for summary judgments were taken together by the SAR as they involved the same question of law between the same two parties.

The plaintiff in the two suits is a commercial bank while the defendant is a body incorporated under the Negeri Sembilan Development Corporation Enactment 1969 (NS Government Enactment No 4 of 1969). Powers to do so are given by the federal law, namely, the Incorporation (State Legislatures Competency) Act 1962 (Act of Parliament No 15 of 1962).

A company by the name of Camlin NS Sdn Bhd was incorporated on 6 July 1974. Of the 2 million shares of $1 each, the defendant (the NS Development Corporation) held 1,399,998 shares. This forms the subject matter of the plaintiff's claim in Civil Suit No 23-255 of 1986.

Another company by the name of Syarikat Gula NS Sdn Bhd was incorporated on 26 September 1975. Out of the 30 million shares of $1 each, the defendant (the NS Development Corporation) held 22,999,997 shares. This is the subject matter of the plaintiff's claim in Civil Suit No 23-256 of 1986.

In consideration of the plaintiff opening and continuing to maintain an account for Camlin NS Sdn Bhd the defendant had given four letters of guarantee dated 2 January 1974, 18 April 1975, 28 August 1976 and 27 October 1976, in respect of the sums of $500,000, $560,000, $300,000, and $200,000 respectively together with interest. It is worthy to note that the period covered here by guarantees was 2 January 1974 to 27 October 1976, for a total amount of $1,560,000.

In respect of the other company, namely, Syarikat Gula NS Sdn Bhd, the defendant gave the letters of guarantee dated 28 August 1975 and 4 August 1976 for $900,000 and $6,000,000 respectively. The period covered here was between 28 August 1975 and 4 August 1976 for a total amount of $6,900,000.

Like thousands of other hare-brained schemes without any pre-feasibility studies both Camlin NS Sdn Bhd and Syarikat Gula NS Sdn Bhd went bust – and the plaintiff bank filed the claims against the defendant as the guarantor.

The facts are not in dispute at all. It is only a pure question of law whether the defendant, the NS State Development Corporation, is liable on the guarantees issued by it.

What then was the law applicable during the period 1974-76? During this period the law in force vis-à-vis the defendant was s 17B of the NS Development Corporation Enactment 1969 which reads:

> The Corporation shall not stand as guarantor to any loan or to any bank overdraft facilities made by any person to any organization except to an organization in which the Corporation has a commercial interest and the liability for the guarantee shall not exceed the same proportion as the capital that the Corporation has invested in the organization.

Clearly, the defendant has no defence at all on the guarantees given. The defendant has the commercial interest in the two companies, in whose favour the guarantees were issued. There is no dispute as to the facts and certainly summary judgments should have been ordered.

As in all cases where a defendant had to fulfil his obligations after solemnly agreeing to do so and when the deal went bust, the defendant here like many others, refused to carry out the obligations which it had earlier agreed to. All sorts of excuses were forwarded to avoid the obligations which they had solemnly undertaken to perform. In our instant case, the defendant is relying on the law and its retrospective effect to get away from the obligations.

The SAR in his grounds of judgment says there are difficult points of law involved and therefore leave was given for the defendant to defend.

True there is some difficulty in the law involved but not on the facts. Arguments on points of law can be made without going to trial proper. It is only a matter of submissions which both parties have advanced in detail.

The Incorporation (State Legislatures Competency) Act 1962 was amended on 6 February 1981 whereby certain provisions of the Act were brought into retrospective effect, namely, s 2 and para (a) of s 4 were made effective from 15 March 1974 and para (b) of s 4 was to be effective from 1 August 1971. Our transaction in this case, ie the letters of guarantee were for the period covering 1974-76. By the same amendment it was laid down that no corporation shall without the prior consent in writing of the Minister of Finance enter into any guarantee involving financial liability (see para 14(1)(d) of the Second Schedule of the Act as substituted by the amendment Act A507).

The issue before the court is whether the bringing into retrospective effect of certain provisions of the law involved could have effect on a party's rights or obligations. This court is of the view that the law cannot be made retrospective to deprive the rights of a party that were legally enshrined by the relevant law at that point of time. It is most unfair to resort to retrospective enactments just to avoid a party's legal obligations. See *Re Athlumney*[1] where at pp 551 and 552, Wright J said: 'Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation ...'.

A retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless the language is very clear and capable of only one meaning, in that it is retrospective. See *Re Chapman*[2] and *Pardo* v *Bingham*.[3]

Clearly the amendments in our case were retrospective, that is without question.

But nowhere is there clear provision in the amendment Act making it retrospective the taking away of an existing right or abolishing an existing obligation. Surely if the legislature had intended to take away an existing right or obligation it would have clearly so stated in the amendment itself.

In the circumstances, the appeal by the plaintiff bank against the decisions of the SAR is allowed, for the amounts which the defendant had guaranteed in the letters of guarantee in favour of the two companies, Camlin NS Sdn Bhd and Syarikat Gula NS Sdn Bhd, as prayed for in the two applications of the plaintiff bank with costs.

Appeal allowed.

Solicitors: *Allen & Gledhill*; *Ismail Brothers.*

Reported by *Ng Sheau Jiuan*

Malaysia Credit Finance Bhd v Yap Hock Choon & Anor

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-13-86
ABDUL MALEK J
12 NOVEMBER 1988

Land Law – Application for foreclosed property to be sold by private treaty by plaintiff bank – Defendant found purchaser for a price less than reserve price – Whether sale by private treaty to plaintiff's valuers' purchaser at higher price a collusive sale – Whether non-disclosure of valuers' purchaser to defendant amounted to bad faith – Whether auction at higher reserve price should be ordered

The plaintiff had taken out foreclosure proceedings against the defendants as regards a piece of property charged by the defendants to the plaintiff. The order for sale was granted and the first auction was fixed with a reserve price of $350,000. Due to objections by the defendants, a second auction was subsequently fixed with a revised reserve price of $400,000 but there were no bidders. The plaintiff now applies for the property to be sold by private treaty at a reserve price of $345,000. This was strongly objected to by the first defendant who contended that the sale by private treaty to the plaintiff's valuers' purchaser at $345,000 would be a collusive sale as the plaintiff did not inform him of its purchaser when he had actually got a purchaser for $330,000. The defendants alleged that the non-disclosure of the valuers' purchaser amounted to bad faith and another auction with a reserve price of $375,000 should be held.

Held, allowing the plaintiff's application:

Having considered the facts and perused the documents, the proposed sale to the plaintiff's valuers' purchaser at $345,000 cannot be considered to be collusive as the price was in fact higher than that offered by the defendant's purchaser. Furthermore, the defendants had also consented to this price earlier on. Taking into account all the circumstances, inter alia, the present state of the economy, the fact that order for sale was made almost two years ago and that any delay would only add to the amount due, an order for another public auction with a reserve price of $375,000 shall not be granted.

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 462 of 1988.]

Poh Chee Seng for the plaintiff.
Thayub Khan (Assistant Official Assignee) for the Official Assignee for the first defendant.
Teresita Antoinette for the second defendant.

Cur Adv Vult

Abdul Malek J: The plaintiff had taken out foreclosure proceedings against the defendants as regards the land held under Certificate of Title No 30924 for Lot No 65195 in the Town of Ipoh (hereinafter 'the said property') which had been charged by the defendants as registered proprietors to the plaintiff to obtain a term loan facility advanced to the first defendant to the limit of $360,000 with interest at 16% pa on monthly rests.

The order for sale was granted on 7 November 1986 and the latest supplementary affidavit on the amount due